

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

COMMERCIAL PROJECT MANAGEMENT, INC.

and

Case 2-CA-35343

EMPIRE STATE REGIONAL COUNCIL OF
CARPENTERS, LOCAL 964, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF AMERICA

Audrey Eveillard, Esq. for the General Counsel.
Richard R. Rodriguez, Esq. for the Union.
Joel J. Greenwald, Esq. and
Kevin Doherty, Esq. for the Respondent.

DECISION

Statement of the Case

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in New York City on October 29, November 25 and December 8, 2003.¹ Upon a charge filed on March 7, and amended on April 22, a complaint was issued on May 22, alleging that Commercial Project Management, Inc. ("Respondent" or "CPM") violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the "Act"). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses and file briefs. Briefs were filed by the parties on January 30, 2004.

Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a New York corporation, with an office and place of business in Middletown, NY, has been a contractor engaged in commercial and residential construction. It has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. In addition, I find that Empire State Regional Council, Local 964, UBC (the "Union") is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates refer to 2003 unless otherwise specified.

II. The Alleged Unfair Labor Practices

A. The Facts

5 1. Background

CPM has three divisions, the Commercial, Drywall and Hardwall Divisions. In February 2003 the Commercial Division had three ongoing projects: the Eastgate project in Goshen NY; the Hatfield Lane project; and the Southern Dutchess Chamber of Commerce project in Wappingers, Falls, NY. John Muller is president of CPM and Richard Carlson was leadman at the Chamber of Commerce project.

2. Volino

15 Dominick Volino has been a carpenter for over 20 years and was a member of Local 11, Empire State Regional Council of Carpenters since 1990. In early February he drove by the Chamber of Commerce project and stopped and spoke to Carlson. He asked Carlson whether it was a Union job. Carlson replied that it was not. Volino then said, "Well, that's okay. I'll work non-Union...it doesn't matter to me". Volino testified that Carlson asked him if he "was in the Union" and that Carlson then said that he knew Joe Karas, the "Union official". Volino
20 responded, "Oh, Joe Karas ... I used to work with him. We used to be working partners ... a couple of years ago, before he became a business representative". Carlson told Volino that Muller does the hiring and that he should call Muller.

25 On February 10 Volino again went to see Carlson at the Chamber of Commerce project. He told Carlson that he spoke to Karas who told him that if he obtained a job with CPM he could help organize the company as a "Salt". In later testimony Volino stated that he told Carlson "I was going to work as a Salt for CPM". Carlson told Volino to keep calling Muller. Carlson called Muller's office and left a message on his voice mail.

30 On Saturday morning, February 22, Muller called Volino and an interview was arranged for later that morning. They met at Muller's office and they spoke about different construction methods. Muller asked Volino where he learned how to do metal framing and Volino replied that he learned it from being in the Union. Volino testified that during the conversation Muller
35 mentioned that if he hires a Union man, "they'll quit for the next Union job" and that one time he hired a Union member who left the jobsite for four hours because the Union representative came and "he didn't want to be seen at the jobsite". Volino testified that Muller asked him whether he knew Joe Karas, to which he replied "no". Volino further testified that Muller told him that he would hire him as a carpenter at \$20 per hour. Volino reported for work on Monday,
40 February 24 but the panels weren't ready. Volino testified that Muller asked him what he would do if a Union business agent came to the jobsite. Volino replied "I just want to concentrate on working". Muller told Volino to report for work the following morning. Volino then left the jobsite and went to meet with Karas. He told Karas that he obtained the job with CPM and would like to join the Salt program. That afternoon Volino signed the Salting Agreement.

45 3. Events of February 25

Volino arrived at the jobsite around 6:30 A.M., February 25. He began to set panels. Around 9:30 A.M. Muller appeared at the jobsite. Volino testified that Muller told him "it looked like we were doing a good job" and that "I could be looking at a leadman position". Volino testified:

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[W]hen John Muller came out there, he asked me, "where does this panel go?" So, I pulled the blueprints out of my pocket...They were upside down ... when they came out of my pocket. I was kind of, like, staring at it for a minute. And – he told me that the plans were upside down....

Volino testified that he and his fellow workers finished setting up the panels around 12:30. He testified that Muller pulled him aside and asked him:

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Do you know Joe Karas? And I said, "No." And then, he said, "You know, the Union official....And, I said, "Yeah, I know Joe Karas". He said, "Well, I was told that you were partners with him". And, he said, "I don't know what's going on here, between you and the Union....[T]hey've been working on me, and I don't know, but I think I smell a rat around here".

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Volino testified that Muller said that he knows that he's "working for the Union", paid him for his work and said "that will be it".

4. Testimony of Muller

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The carpentry work was scheduled to begin at Eastgate on February 25. Jim Northrip was leadman at Hatfield Lane, which was across the street from Eastgate. Muller testified that he interviewed Volino on Saturday, February 22. During the interview Volino mentioned one of his prior employers, which was a Union shop. Muller denied that he asked Volino whether he was a Union member. Muller testified that he hired Volino as a leadman, stating, "as soon as he told me he ran large crews, then I thought okay, that's what I'm looking for. I need a guy like that".

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Muller testified that during the interview he asked Volino whether he knew Karas, to which Volino replied, "no". Muller also asked Volino whether he would leave him in the lurch "if a union guy called". Volino replied that he would work "job by job".

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Muller testified that around 10 A.M. on February 25 he asked Volino whether he knew Karas. Muller testified that he told Volino that Carlson had told him that Volino admitted that he knew Karas and that he had been "business partners" with him. Muller denied telling Volino that he "smelled a rat between him and the Union".

At around 12:30 P.M. Muller fired Volino. Muller testified that he told Volino:

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[L]isten, you're not a lead guy. It's not going to work out. I need a guy to run this job. You're not running this job. The plans were upside down. I got my Super setting panels now...I have carpenters. I need a guy to run this job.

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Muller testified that he has hired "quite a few" Union members. He testified that applicants for jobs tell him where they have worked and that to do commercial work unions are a "good place to learn". He stated, "We've actually suggested why don't you go join a union. They have trade schools and stuff you can learn". Muller further testified that since Volino was discharged, they have not hired any new carpenters, but instead they laid off two carpenters. In answer to the question why the company laid off two carpenters, Muller testified:

I have too many carpenters. Jim couldn't control them all...and that's why I was looking for a guy to run that job....I don't send three carpenters to a job and they just make the best of it. There is always somebody in charge that day.

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After Muller discharged Volino, Muller testified that Volino told him "Well, I don't know what the big deal is that I'm union. Muller replied, "Dominick, it has nothing to do with that. I knew that before I hired you. But you are being let go because you are not a leadman, and that's what I hired you for".

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5. Testimony of Swan, Robinson and Northrip

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James Swan is a leadman for CPM. He testified that Volino was hired to be a "lead guy" at Eastgate. Swan testified that the person who was supposed to be running the job at Eastgate got injured and that Muller was looking for a replacement "because he didn't think I was going to be able to handle both sites at the same time. He said it's going to just be too much for me. So, that's where Dominick was brought in".

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Swan testified that on the morning of February 25, there were three employees plus Volino at the jobsite. Swan deposited the supplies and saw that Volino was about to use what Swan regarded as the wrong pins. Swan testified that he was a "little leery" and told Northrip of his concern. Muller then appeared at the jobsite and Swan told him, "John, I don't know if this cat's going to make it".

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Harry Robinson was a carpenter at CPM. He testified that he worked with Volino at the Eastgate project on February 25. It was his understanding that Volino would be the leadman. Jeffrey Northrip is the construction superintendent at CPM. He testified that Volino was brought in to "lead the manpower" at Eastgate. He testified that Volino told him "you're going to have to help me" with respect to where the panels should be placed and that he appeared to be "confused" about the plans. He testified that he told Muller that Volino "wasn't directing the manpower, as he should have been".

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B. Discussion and Conclusions

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1. Section 8(a)(1) Allegations

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The complaint alleges that on February 22 Muller interrogated Volino about his Union membership. Volino testified that during the interview he and Muller discussed Volino's past jobs. Muller denied that he asked Volino whether he was a Union member. I credit Muller's testimony, which was not contradicted. Accordingly, the allegation is dismissed.

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The complaint further alleges that on the same day Muller informed Volino that Union membership would be an impediment to Volino being hired. Respondent knew as early as February 10 that Volino knew Karas, that he had been a "business partner" with him and that Volino intended to become a Salt at CPM. During the interview Volino told Muller that he was a Union member. While Muller admitted saying "usually when I hire union guys, it doesn't work out", I credit his testimony that he also told Volino:

[W]e're very picky about the personnel that we choose...and a lot of guys can't cut it. And that's any hire. That's a guy off the street hire, a union guy. It doesn't matter.

As Volino testified, the two concerns of Muller were that employees not leave in the middle of a job and that if a Union business agent showed up, the employee would not absent himself for a long period of time so that the business agent wouldn't see him working at a non-union job.

5 Muller knew that Volino was a Union member. He hired him nevertheless. I find that General Counsel has not shown that Muller threatened Volino that Union membership would be an impediment to Volino being hired. The fact that Muller required that Volino not leave in the middle of the job, or not absent himself because a business agent appears at the jobsite is not an unlawful requirement. See *Willmar Electric Service*, 303 NLRB 245, 246 n. 2 (1991).
10 Accordingly, the allegation is dismissed.

The complaint also alleges that on February 24 and 25 Muller interrogated Volino about his Union membership and activities. Volino testified that on February 24 Muller asked him what he would do if a business agent came to the jobsite. Volino replied that he "just wanted to concentrate on working". Volino further testified that on February 25 Muller asked him whether he knew Joe Karas. Similarly, Muller testified that on February 25 he asked Volino whether he knew Karas. When Volino replied that he did not know him, Muller told Volino that Carlson had told him that Volino had admitted knowing Karas and that he had been a "business partner" of Karas. Volino also testified that Muller told him "I don't know what's going on...between you and the Union....I think I smell a rat...." Muller denied making such a statement.
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With respect to the alleged comment, "I think I smell a rat", there was no similar testimony from anyone who heard the statement being made by Muller. I credit Muller's testimony that he did not make such a statement. Concerning Muller's question whether Volino knew Karas, as early as February 10 Volino told Carlson that he knew Karas and that he had been his "business partner". Both General Counsel and Respondent maintain that Carlson was an "agent" of Respondent. Indeed, General Counsel's brief states that the record contains direct evidence that Carlson told Muller that Volino and Karas "were close associates, i.e. 'business partners'." Respondent's brief states, "it is clear that agents of CPM knew of Mr. Volino's union sentiments and activities prior to his interview and hire".
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As of February 10 Respondent was aware that Volino knew Karas and had been his "business partner". Muller knew that Volino was a Union member and indeed, Respondent had been told by Volino that he intended to become a Salt at CPM. Yet, despite this knowledge, Muller hired Volino. I find that General Counsel has not sustained her burden. Accordingly, the allegations are dismissed.
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2. Volino Discharge

40 I credit Muller's testimony that Volino was hired to be a leadman. This was corroborated by the testimony of Swan, Robinson and Northrip. On February 25, the tools and blueprints were delivered to Volino, not to the other three employees at the jobsite. When Volino was initially asked how long he looked at the blueprints upside down, he testified, "one minute". After General Counsel's leading question that he looked at the plans for "one second", he replied that he looked at them for "three seconds". I give more weight to his answer to the non-leading question, and find that he looked at the plans upside down for approximately one minute.
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Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989, the Board requires that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct".

I do not believe that General Counsel has made a *prima facie* showing that protected conduct was a motivating factor in Respondent's decision to discharge Volino. Before Muller hired Volino, Respondent knew that Volino was a Union member, that Volino knew Karas and that he intended to become a Salt at CPM. Nevertheless, Muller hired Volino. Even, however, if it be deemed that a *prima facie* showing has been made, I believe that Respondent has sustained its burden of demonstrating that the "same action would have taken place even in the absence of the protected conduct".

Volino was hired to be a leadman at the Eastgate project. On February 25 Northrip and Muller observed that Volino was not "leading". He asked Northrip where to place the panels, he seemed confused and he didn't appear able to read the blueprints. Accordingly, I find that Respondent has sustained its burden and the allegation is dismissed.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act in the manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:²

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

D. Barry Morris
Administrative Law Judge

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.